

DEPARTMENT OF BUSINESS OVERSIGHT*Ensuring a Fair and Secure Financial Services Marketplace for all Californians*

Jan Lynn Owen
Commissioner of Business Oversight

February 27, 2018

Via Email & U.S. Mail

Re: _____ - Opinion Request

Dear _____:

Thank you for your letter dated January 29, 2018, in which you responded on behalf of _____ (“_____”) to the Department of Business Oversight’s letter dated December 11, 2017. In the letter, you assert that _____ should be exempt from the licensure requirements of the California Money Transmission Act (“MTA”)¹ under Financial Code section 2010, subdivisions (h) and (j). In the alternative, _____ requests that the Department exempt it under Section 2011.

BACKGROUND

On June 6, 2017, the Department issued an opinion letter to _____’s counsel, _____, wherein the Department concluded that the MTA applies to _____ activities. The Department’s June 6 letter was in response to _____’s prior arguments that _____ credit is not “stored value” as that term is defined in Financial Code section 2003, subdivision (x).

In the January 29 letter, _____ does not indicate that its current _____ activities are different from its prior activities, which were previously considered by the Department.

Nonetheless, _____ is now arguing that it should be exempt as an operator of a payment system² and as a company that provides payroll processing services.³ Alternatively, _____ requests an exemption under Financial Code section 2011

¹ Cal. Fin. Code, § 2000 et seq.

² Cal. Fin. Code, § 2010, subd. (h).

³ Cal. Fin. Code, § 2010, subd. (j).

if the Department disagrees with _____'s assertion that it is exempt under Section 2010.

MONEY TRANSMISSION ACT

A. Operator of a Payment System

Financial Code section 2010, subdivision (h) excludes from the MTA an "operator of a payment system ***to the extent that it provides processing, clearing, or settlement services, between or among persons excluded by this section***," in connection with funds transfers.⁴ In other words, a person can only qualify under this subdivision if it provides processing or settlement services only between or among persons otherwise excluded under Section 2010. The sender and receiver of the funds must each be an excluded entity. For example, a person who provides settlement services between two banks would qualify for the exemption. This is because a bank is excluded under Section 2010, subdivision (d). In _____'s case, the sender is not an excluded entity. Rather, the sender is a merchant. Therefore, _____ does not qualify for an exclusion under Section 2010, subdivision (h) because it is not providing settlement services between excluded entities.

B. Payroll Processing

Financial Code section 2010, subdivision (j) excludes from the MTA a person that (1) delivers wages or salaries on behalf of employers to employees or (2) facilitates the payment of payroll taxes to state and federal agencies, or (3) transmits other funds on behalf of an employer in connection with transactions related to employees. However, such person is still subject to the MTA for other money transmission services that it offers.

Therefore, this subdivision provides for an exclusion from the MTA for a person who facilitates payroll-related or employer-employee transactions. It does not exclude the payment of other types of taxes.

According to your January 29 letter, _____ facilitates not just the payment of payroll taxes but also the payment of sales tax and other indeterminate "associated fees." Accordingly, _____'s delivery of wages/salaries and payroll taxes would qualify for the exclusion under Section 2010, subdivision (j). However, _____'s payment of all other types of taxes and fees would not qualify. _____ would need to be licensed to transact those other money transmission services.

⁴ Emphasis added.

C. Public Interest Exemption

Financial Code section 2011 authorizes the Commissioner to exempt from the MTA any person or transaction if such action is in the public interest, and the regulation of such persons or transactions is not necessary. Section 80.3002 of Title 10 of the California Code of Regulations specifies the factors that an applicant should discuss when requesting an exemption under Financial Code section 2011.

Your letter did not address the factors in Section 80.3002. _____ has instead asserted that its operations are in the public's interest because they: (1) benefit the unbanked and underbanked businesses and consumers; (2) provide transparency, compliance, and a common network among members and participating government agencies; (3) offer efficient, dependable, and safe cash management solutions; and (4) assist government agencies in the collection of tax revenue.

While the stated purposes of _____'s operations may provide benefits to the public, _____ has not offered any facts to support a finding that the regulation of _____ is not necessary or that the exemption of _____ from the MTA licensing requirements would itself be in the public interest. For example, _____ has not suggested that it is regulated and examined by another governmental entity in a satisfactory manner, which could be a factor in determining whether _____ would also need to be regulated by the Department. The Department does not view registration with the Financial Crimes Enforcement Network ("FinCEN") as the equivalent of being licensed and regulated under the MTA.

In addition, based on the facts provided by _____, its business operations are not unlike many of the Department's money transmitter licensees. Therefore, the Commissioner declines to issue an order exempting _____ under Financial Code section 2011.

CONCLUSION

With the exception of _____'s payroll processing operations to the extent they meet the requirements of Financial Code section 2010, subdivision (j), the Department again concludes that the MTA does apply to _____'s _____ activities. Therefore, _____ should not conduct these activities in California unless and until it has obtained a license from the Department.

This opinion is limited to the facts and circumstances described above regarding the application of the MTA. If any of the facts or circumstances change, the Department's opinion could also change.

If you have any questions, please contact me at _____.

Sincerely,

Jan Lynn Owen
Commissioner
Department of Business Oversight

By

Jennifer L.W. Rumberger
Senior Counsel